



IRA A. JACKSON
COMMISSIONER

The Commonwealth of Massachusetts
Department of Revenue
Leverett Saltonstall Building
100 Cambridge Street, Boston 02114

June 25, 1984

("Utility") is an electric utility that enters into agreements with cable television companies permitting the companies to attach coaxial cable and related materials and equipment to the Utility's poles. You inquire whether the Utility's charges under the agreements are subject to the sales tax.

The agreements characterize the Utility as "licensor" and the company as "licensee". They include the following provisions:

"Licensor agrees to issue to Licensee for any lawful communications purpose, revocable, nonexclusive licenses authorizing the attachment of Licensee's attachments to Licensor's poles. . . ."

"No use, however extended, of Licensor's poles or payment of any fees or charges required under this Agreement shall create or vest in Licensee any ownership or property rights in such poles. Licensee's rights herein shall be and remain a license."

. . . .

"Nothing herein contained shall be construed as a grant of any exclusive authorization, right or privilege to Licensee. Licensor shall have the right to grant, renew and extend rights and privileges to others not parties to this Agreement, by contract or otherwise, to use any pole covered by this Agreement."

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The contract price consists of: (1) an annual "attachment fee" for each pole on which space has been reserved or occupied by the company, and (2) a charge based on the cost to the Utility of conducting field surveys and inspections, removing the company's attachments from poles, and other work performed for the company by the Utility.

The sales tax is an excise on retail sales of tangible personal property (G.L. c. 64H, § 2). "Sale" generally means "[a]ny transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property for a consideration, in any manner or by any means whatsoever." The definition of "sale" in the sales tax does not include licenses to use tangible personal property.

The principal criterion for distinguishing between leases and licenses in Massachusetts is whether the owner of the property in question has granted (1) an exclusive right to use the property for all purposes not prohibited by the agreement (a lease); or (2) a non-exclusive right to use the property for a particular purpose (a license). See Jones v. Donnelly, 221 Mass. 213 (1913), wherein the Supreme Judicial Court held that an agreement granting the right to use the roof of a building for advertising purposes created a license, not a lease.

On the facts you state, the Utility is granting the cable television companies a non-exclusive right to use its poles for the limited purpose of attaching cables and related items. This grant is a license to use, not a lease of, the poles. Therefore, it is ruled that the charges for permitting the attachment to the Utility's poles of coaxial cable and related materials and equipment are not subject to the sales tax.

Very truly yours,



Commissioner of Revenue

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